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IN THE

Supreme Court of the United States

October Term, 1982

SPLIT ROCK NURSING HOME,

Petitioner,

against

THE OFFICE OF HEALTH SYSTEMS MANAGEMENT OF THE DEPARTMENT OF HEALTH OF THE STATE OF NEW YORK, THE HON. DAVID AXELROD, M.D., COMMISSIONER OF HEALTH OF THE STATE OF NEW YORK, RICHARD A. BERMAN, DIRECTOR OF THE OFFICE OF HEALTH SYSTEMS MANAGEMENT,

Respondents.

On Petition for a Writ of Certiorari to the New York State Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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Question Presented

Is the due process clause of the Fourteenth Amendment violated where a state administrative agency reinterprets a Medicaid regulation and applies the new interpretation retroactively to justify the seizure of thousands of dollars in reimbursement previously paid pursuant to the old interpretation?

Parties to the Proceedings

The names of all parties are contained in the caption of the case in this Court.

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PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

Split Rock Nursing Home respectfully petitions for a writ of certiorari to the New York State Court of Appeals to review the judgment of that Court.

Opinions Below

The opinion of the New York Court of Appeals is reported officially at 56 N.Y.2d 932 (1982); it has not yet been reported unofficially. The opinion of the Appellate Divi-

sion, Third Department, is reported officially at 85 A.D.2d 808 (3rd Dept. 1981) and unofficially at 445 N.Y.S.2d 638 (3rd Dept. 1981).

The opinions of the hearing officer and the Director of Health Systems Management are unreported, but can be found in the Appendix at pages 20a-32a and 8a-19a, respectively.

Jurisdiction

The judgment of the New York Court of Appeals, reversing the order of the Appellate Division, Third Department, was rendered June 17, 1982. This petition for certiorari was filed less than ninety (90) days from that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Constitutional Provisions and Regulations Involved

United States Constitution Amendment XIV

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of any State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

10 New York Code of Rules and Regulations § 86.31*

> Incentive allowance; proprietary nursing homes. Within the rate of payment for proprietary nursing homes, an amount may be included as an allowable cost which is equal to a percentage established by the Commissioner to represent a sharing in the amount by which the total costs of administrative, dietary and housekeeping services of an individual facility are lower than the weighted average ceiling of the costs of these services for the group. In instances where the latest survey disclosed significant deficiencies in the operation of a facility, the incentive allowance will not be available.

Statement of the Case

Split Rock Nursing Home (petitioner) is a private proprietary nursing home located in the Bronx, New York. During the relevant years—1972 and 1973—expenses incurred by petitioner in caring for Medicaid-eligible patients were reimbursed in accordance with federal and state statutes and rules promulgated by the United States Department of Health, Education and Welfare (now the Department of Health and Human Services) and the New York State Department of Health. See, generally, Title XIX of the Federal Social Security Act, 42 U.S.C. § 1396 *et seq.*; New York Public Health Law § 2807 (McKinney); New York Social Services Law §§ 363-368 (McKinney); 42 C.F.R. 430 *et seq.* (formerly contained in 45 C.F.R.); 10 New York Code of Rules and Regulations Part 86.

Under the federal Medicaid program, states are permitted to establish their own regulations, provided those

* This regulation was repealed on October 14, 1975.

regulations conform to the federal guidelines contained in 42 U.S.C. § 1396 (a). In order to encourage facilities to be cost efficient, the State of New York included an "incentive allowance" in its reimbursement regulations. Facilities which operated at a cost lower than the average of facilities in the same area and of the same size (the facility's "group") were given a portion of that cost-savings as an incentive unless "the latest survey disclosed significant deficiencies in the operation of [the] facility . . . ." 10 New York Code of Rules and Regulations § 86.31.

During 1972 and 1973, Split Rock Nursing Home, as a cost-efficient facility, qualified for and received an incentive allowance of approximately $90,000.

In January, 1975, Hugh Carey, the new Governor of New York, appointed Dr. Robert P. Whalen as the Commissioner of the Department of Health. In 1975, Commissioner Whalen repealed the incentive allowance regulation promulgated by the previous Commissioner of Health, who had been appointed by Governor Rockefeller.

In 1978, Commissioner Whalen revoked the incentive award previously paid to Split Rock in 1972 and 1973, and the Health Department seized approximately $90,000 from petitioner by withholding that amount from the reimbursement the home was entitled to receive in 1978.*

Petitioner's protest and request for a hearing were summarily denied by the Health Department. It was not until a court order was obtained by petitioner that a hearing was ultimately held.

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* Additional sums were withheld relating to other items of reimbursement. Review is sought, however, only in connection with the incentive award.

The hearing officer appointed by the Commissioner of Health nullified the seizure; after hearing the testimony of Health Department officials concerning the interpretation and application of the regulation, the hearing officer found for petitioner in accordance with the interpretation given to the regulation by the Health Department during the years in question.

But the Commissioner of Health overruled his own hearing officer and approved of the seizure. The Commissioner based his ruling upon a "new interpretation" of the regulation governing the incentive program which, in fact, amounted to adding requirements never previously required.

Petitioner commenced a proceeding in the New York Supreme Court to set aside the Commissioner's order. Pursuant to state law (New York Civil Practice Law and Rules 7804(g) (McKinney)) the proceeding was transferred to the State Appellate Division, Third Department. A unanimous Appellate Division annulled the Commissioner's order, finding* that petitioner was entitled to the incentive award under the regulation as interpreted by the Health Department at the time the award was granted. The Appellate Division also found that the decision to revoke the incentive award was based on a "new interpretation" of the regulation, that the new interpretation was "not supported by any administrative precedent, written or otherwise," and that the new interpretation was set forth in writing for the first time "four years after repeal of the

* The factual findings of the Appellate Division were final and binding on the parties and not subject to review by the Court of Appeals. N.Y. Const. art. 6, § 3.

regulation and two years after petitioner first protested" the Health Department's seizure.* See Appendix C at 7a.

The New York Court of Appeals reversed, and reinstated the Commissioner's determination in a three sentence opinion, rendered after summary consideration and without oral argument. The Court concluded that it was bound by the Department's new interpretation of its own regulation as long as the Department was not acting in an arbitrary or unreasonable fashion.

Reasons for Granting Certiorari

POINT I

New York State Acted Unconstitutionally When It Seized Money Paid to Petitioner Years Earlier by Giving Retroactive Effect to a New Interpretation of Its Own Regulation

We do not believe that this Court has previously decided the precise question presented in this case—the constitutionality of applying a new interpretation of an existing administrative regulation retroactively and thereby revoking previously vested rights. However, this Court has addressed the retroactive effect of new regulations and statutes, and has repeatedly refused to allow retroactive

* Petitioner argued in its brief to the Appellate Division that the Health Department's retroactive revocation of the incentive award violated due process. Although the Appellate Division did not specifically address that issue, the Court's opinion implicitly adopted petitioner's due process claim. The Court of Appeals determined the case on the Appellate Division briefs and letters of submission pursuant to the Court's expedited summary procedure (New York Court of Appeals Rules § 500.2).

application which would deprive a person of a right that had matured. Those cases make it clear that petitioner's substantive due process rights under the Fourteenth Amendment were violated by the Health Department's actions in this case.

When an interpretation of a statute or regulation urged by an administrative agency will result in the forefeiture of a right previously matured, this Court has rejected the agency interpretation and insisted instead upon a construction which does not result in the forefeiture.

For example, in *Greene* v. *United States*, 376 U.S. 149 (1964), this Court refused to give retroactive application to a regulation of the Department of Defense despite the Department's claim that the regulation was intended to be retroactive. Under the retroactive application urged by the Agency—and rejected by this Court—Greene would have been deprived of rights which had already vested under the prior regulation.

Greene, an employee of a private corporation supplying military parts to the United States, was discharged by the corporation in 1953 because of the revocation of his security clearance by the Navy. In 1959 this Court ruled that the revocation was improper because Greene had been denied the right to confront and cross-examine his accusers, and remanded. Greene had obtained new employment, however, during the course of the litigation, but at a lower salary, and accordingly did not seek reinstatement after the remand. He sought only to recover compensation for the unauthorized discharge, relying on the regulations in effect at the time this Court remanded in 1959. The Department

of Defense refused to consider Greene's claim under that regulation, claiming that a newly adopted regulation governed. But the new regulation, issued after Greene's "claim had arisen and had been formally asserted" [376 U.S. at 153], substantially altered the rules applicable to compensation claims such as Greene's. Under the prior regulation Greene was clearly entitled to recover; under the new regulation his right to recover became dubious.

This Court refused to permit the Defense Department to apply its new regulation retroactively, and held that Greene was entitled to have his claim decided under the former regulation, ruling:

> Whatever petitioner's rights are, there can be no doubt they matured and were asserted under the [former] directive. Not until six months after petitioner formally presented his claim to the Department of Defense did the Secretary of Defense issue a new, and substantially revised, regulation concerning "monetary restitution". Thus the Government's argument necessarily requires that the [new] regulation be given retroactive application. As the Court said in *Union Pac. R. Co.* v. *Laramie Stock Yards Co.*, 231 U.S. 190, 199, "the first rule of construction is that legislation must be considered as addressed to the future, not to the past . . . [and] a retrospective operation will not be given to a statute which interferes with antecedent rights . . . unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.' " Since requlations of the type involved in this case are to be viewed as if they were statutes, this "first rule" of statutory construction appropriately applies and under the circumstances, it would be unjustifiable to give the [new] regulation retroactive effect (footnote omitted).

376 U.S. at 160.

Similarly, in *United States* v. *Larionoff*, 431 U.S. 864 (1977) this Court refused to permit the Navy to apply a new statute retroactively which would have deprived individuals of rights already vested. At issue was the constitutionality of the Navy's attempt to restrict the right to re-enlistment benefits. The Navy sought to apply the new statute to individuals who had re-enlisted while the old statute was still in effect. Under the former statute they were entitled to benefits which the new statute took away.

This Court flatly rejected the Navy's attempt to apply the new statute retroactively, ruling:

> Thus, unless Congress intended, in repealing the VRB program in 1974, to divest Johnson of the rights he had already earned, and constitutionally could do so, the prospective repeal of the program could not affect his right to receive a VRB, even though the date on which the bonus was to be paid had not yet arrived.
>
> Of course, if Congress had such an intent, serious constitutional questions would be presented. No one disputes that Congress may prospectively reduce the pay of members of the Armed Forces, even if that reduction deprived members of benefits they had expected to be able to earn. Cf. *Bell* v. *United States*, 366 U.S. 393 (1961); *United States* v. *Dickerson*, 310 U.S. 554 (1940). It is quite a different matter, however, for Congress to deprive a service member of pay due for services already performed, but still owing. In that case, the congressional action would appear in a different constitutional light (citations omitted).

431 U.S. at 879.

The decision by the New York Court of Appeals is in conflict with the foregoing decisions of this Court. It is

also in conflict with decisions by various district and circuit courts interpreting and applying the federal Medicare program.

For example, in *Coe* v. *Secretary of Health, Education and Welfare,* 502 F.2d 1337 (4th Cir. 1974), the court refused to give retroactive application to a change in the Medicare reimbursement regulations although urged to do so by H.E.W. Coe had undergone medical treatment at a time when the regulations authorized reimbursement for such treatment. The regulations were thereafter changed to exclude reimbursement for such treatment. H.E.W., relying on the new regulations, refused to pay for the services. But the court ordered payment, concluding that retroactive application of the new regulation would result in "manifest injustice."

Similarly, in *South Windsor Convalescent Home, Inc.* v. *Weinberger,* 403 F.Supp. 515 (D. Conn. 1975) *rev'd on other grounds,* 541 F.2d 910 (2d Cir. 1976), the court, despite the urging of H.E.W. refused to give retroactive application to a new Medicare regulation. An old regulation had permitted the nursing home to depreciate capital assets by a particular accounting method; a new regulation thereafter promulgated barred the use of that accounting method. H.E.W. attempted to utilize the new regulation in order to recoup the reimbursement previously given to the nursing home under the old regulation. The court refused to permit recoupment, concluding that retroactive application of the new regulation would constitute a violation of the due process clause of the Fifth Amendment. *See also, Johnson* v. *Finch,* 328 F.Supp. 1169 (E.D. La. 1971).

From all the foregoing cases, the rule that emerges is quite clear: when vested property rights are at issue, a court may not defer to an administrative agency's new interpretation of an existing regulation on the grounds that the interpretation is "reasonable" in the abstract. The critical issue is whether the new interpretation is to be prospective or retroactive as well. Prospective application of the new interpretation may pass constitutional muster. But the Fourteenth Amendment bars a retroactive application which destroys vested rights.

In the instant case, the New York Court of Appeals ignored the constitutional implications of applying the Health Department's new interpretation retroactively.* Also ignored was the effect that a retroactive application of that interpretation would have on petitioner's vested rights. As a result, the State was permitted to seize more than $90,000 paid many years earlier to petitioner.

Under New York Law, reimbursement, once received, is a vested property right protected by due process. *E.g., Birchwood Nursing Home* v. *Whalen*, 70 A.D. 2d 1020, 418 N.Y.S.2d 212 (3rd Dept. 1979). This Court's rulings in *Greene* and *Larionoff* declare that such rights cannot be taken away by a retroactive application of a regulation or statute.

In *Greene* and *Larionoff*, it should be noted that the rights in question had matured, but the benefits had not been received. In the instant case, the rights had matured

* The Court also ignored New York's Administrative Procedure Act which prohibits "retroactively chang[ing] a valid declaratory ruling. . . ." New York State Admin. Proc. Act § 204 (McKinney).

and the benefits had been received; the Health Department had paid the money to petitioner many years before, unconditionally. We submit that the constitutional infirmity is more egregious in the instant case.

Petitioner was entitled to rely on the Health Department's prior interpretations. *Cf. Udall* v. *Tallman*, 380 U.S. 1 (1965). During 1972 and 1973 as a result of its efforts to reduce costs, petitioner properly received an incentive allowance in accordance with the program as then interpreted and applied. Petitioner was entitled to rely on that interpretation and to treat the incentive allowance as its own money absolutely and unconditionally. To permit that money to be taken back years later by virtue of a "new interpretation" of the regulation publicly issued for the first time in the Health Commissioner's decision in this case is fundamentally unfair, and thus a clear violation of due process.

POINT II

This Case Presents a Question of Continuing National Importance

The questions raised in this case involve the integrity of a national program established by the Federal Government for "the purpose of enabling each state . . . to furnish medical assistance . . ." to the needy. 42 U.S.C. § 1396. We submit that the decision of the New York Court of Appeals, if left intact, will impact negatively on the administration of that program. Accordingly, this case presents a question of national importance which should be decided by this Court.

The Medicaid system, created by Congress in 1965, has been described as "the largest and most significant piece of social legislation ever to pass the Congress . . ."* Billions of dollars of federal funds are made available each year to state governments which have submitted a plan approved by the Department of Health and Human Services. The federal enabling legislation sets forth strict guidelines for the states which act as agents of the federal government in administering the program on behalf of Health and Human Services. 42 U.S.C. § 1396(a). Volumes of regulations, both federal and state, control the reimbursement system and related questions.

The unconstitutional seizure of petitioner's funds threatens the integrity of the federal program, a program established to provide necessary medical treatment to the indigent. The program requires broad provider participation, which in turn requires reasonable assurance that providers will be treated fairly. It is fundamentally unfair to allow an agent of the Federal Government—here the New York State Department of Health—to alter the rules for reimbursement in order to seize money previously paid to and spent by the providers. Such a result would not only be fundamentally unfair and unconstitutional. It would also be self defeating: it would discourage qualified providers of medical services from participating in the program; they would no longer be able to rely on the integrity of the United States Government.

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* Statement by Senator Russell B. Long, July 6, 1965, III Cong. Record 15037.

The action of New York, if condoned, would encourage other states to ignore constitutional imperatives in acting as agents for the Federal Government. The precedent is dangerous, and should be rejected by this Court.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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